IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 15TH JANUARY 2007 / 25TH PAUSHA 1928

Crl.MC.No. 1888 of 2005()

CC.2420/2004 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM

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PETITIONER:

R.KARUNANITHI, 87/48,
CHAMIERS ROAD, R.A.PURAM,
CHENNAI-28.

BY ADV. SRI.G.SHRIKUMAR
SRI.K.S.MOHAMMED ZIYAD

RESPONDENTS:

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1. BHARAT SANCHAR NIGAM LTD.,
REPRESENTED BY SENIOR ACCOUNTS OFFICER (CASH),
OFFICE OF THE DEPUTY GENERAL MANAGER,
SOUTHERN TELECOM SUB REGION, ERNAKULAM.

2. M/S.DATA ACCESS (INDIA) LTD.,
BLOCK E", 2ND FLOOR, ITT, NEHRU PLACE,
NEW DELHI-110 019.

3. SIDDHARTHA RAY, MANAGING DIRECTOR,
M/S.DATA ACCESS (INDIA) LTD. BLOCK E,
2ND FLOOR, ITT, NEHRU PLACE, NEW DELHI-110019.

4. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR.

BY ADV. SRI.MATHEWS K.PHILIP,SC, BSNL

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 15/01/2007 ALONG WITH CRMC NO.1903/05 AND OTHER CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.M.C.NOs. 1888, 1903, 1905 & 1906 OF 2005

Dated this the 15th day of January, 2007

ORDER

This case calls for interpretation and application of propositions (a) to (c) in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209).

2. The common petitioner is the 3rd accused in four connected prosecutions – all initiated by the 1st respondent/ complainant under Sec.138 of the N.I. Act. Admittedly, the petitioner is not a signatory to the four cheques in question. He has been sought to be fastened with liability under Sec.138 read with Sec.141 of the N.I. Act on the basis of the following specific identical allegations raised in para-1 of the four complaints concerned:

> "The first accused is a public limited company, the second accused is the Managing Director and the third accused is the Director Finance of the first accused. The second and third accused

> are fully involved in the working of the first accused company."
>
> (emphasis supplied)

3. Later in para-6 of all these complaints, the following identical averments also do appear:

> "6. At the time when the cheque was given to the complainant, the accused made him believe that there is sufficient fund in the account of the accused. But when the cheque was presented it came in to the notice of the complainant that there is no sufficient fund in the account of accused to honour the cheque. Thus the accused purposefully cheated the complainant and thereby sustained wrongful gain and failed to pay the amount even after the receipt of this notice."

4. The complaints were filed before the learned Magistrate. Cognizance was taken. Summons was issued to all the accused including the petitioner herein. On receipt of the summons from

the court, after entering appearance before the learned Magistrate, the petitioner/the 3rd accused has come to this Court with a prayer that the cognizance taken against him may be quashed invoking the powers under Sec.482 of the Cr.P.C.

5. What is the reason? The short contention raised is that no averments to attract culpable liability under Sec.138 read with Sec.141 of the N.I. Act have been raised against the petitioner. Inasmuch as the vital and crucial averments to attract the play of Sec.141 of the N.I. Act are not even made in the complaint, powers under Sec.482 of the Cr.P.C. are labile to be invoked and the proceedings should be brought to premature termination. This, in short, is the plea.

6. There is no dispute before me, at this stage, that the petitioner was not the Director Finance of the 1st accused – Company on the date when the cheque was dishonoured. He was admittedly not the Director Finance on the date when the cheque was issued. But on the date when the cheque was presented and it was dishonoured, the petitioner was admittedly the Director Finance of the Company.

7. Sec.141 of the N.I. Act refers to "the time when the offence was committed". That expression has been considered in **Kairali Marketing and Processing Co-operative Society Ltd., and another v. Pullengadi Service Co-operative Society Ltd., and another** (ILR 2006 (4) Kerala 697) and it has been held that the offence under Sec.138 of the N.I. Act must be held to be committed on the date when the cheque was returned unpaid. So, the petitioner was on the relevant date the Director Finance of the company. There is no dispute on this aspect of the matter.

8. The crucial and vital dispute is raised in the light of the proposition (a) laid down in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209). Cognizance should not have been taken inasmuch as a specific assertion that the petitioner/the 3rd accused was "in charge of and responsible to the company for the conduct of its affairs" has not been raised.

9. It will be apposite in this context, first of all, to refer to the three specific questions which were considered by a larger Bench of the Supreme Court in **S.M.S. Pharmaceuticals Ltd.**

v. Neeta Bhalla (2005 (4) KLT 209). They are extracted in para-1 as follows:

> "(a) whether for purposes of S.141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfills the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.
> (b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.
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> (c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors or Joint Managing Director who admittedly would be in charge of the company and responsible to the company

for conduct of its business could be proceeded against."

9. After elaborate discussions, the questions are answered in the following words in para-10 of **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209):

"(a) It is necessary to specifically aver in a complaint under S.141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of S.141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company

for conduct of its business. The requirement of S.141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under S.141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under S.141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly

responsible for the incriminating act and will be covered under sub-s (2) of S.141."

10. The question then is whether the averments in the complaint in paras-1 and 6 which I have already extracted above are sufficient to attract liability at the threshold to justify the issue of process under Sec.204 of the Cr.P.C. against the petitioner.

11. Two contentions are raised by the respondent/ complainant. Firstly, he contends that the requirements of proposition (a) are substantially satisfied though the words of the statute have not been ritualistically repeated. By making the assertion - undisputed now, that the petitioner is the Director Finance of the company and that he is fully involved in the working of the 1st accused – company, the requirements of proposition (a) referred above must be held to be satisfied though the words of the statute have not been borrowed and repeated in the complaint.

12. Alternatively, the learned counsel for the respondent

contends that just like the Managing Director or the Joint Managing Director, the Director Finance who is fully involved in the working of the company must be held to be liable under Sec.138 read with Sec.141 of the N.I. Act by the operation of proposition (c) extracted above and even in the absence of more specific and better averments, an official of the company like the Director Finance who is fully involved in the working of the company must be held to be liable under Sec.138 read with Sec.141 of the N.I. Act at least at the threshold stage where the court only considers whether "there is sufficient ground to proceed against the accused."

13. The dictum in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209), according to me, cannot be read in any artificial or myopic manner. Due allowance for inelegance and innocent inadequacy in pleadings must certainly be conceded if in its core and substance there is no doubt or confusion created in the mind of the court. Proposition (a) of **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209), according to me, cannot be read ritualistically and

myopically to conclude that the words of the statute must as such be repeated in a complaint. We may have buried forms; but still forms do guide us from the grave. But even then, where the core or essential satisfaction can be drawn from the averments made, it would be incorrect and improper to non-suit a complaint for the mere reason that the words of the statute have not been repeated. It must hence be held that proposition (a) is itself satisfied by the averments substantially.

14. Further a Managing Director and Joint Managing Director can as per proposition (c) be made liable even in the absence of a specific averment that they were in charge of and responsible to the company for the conduct of its affairs. **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209) did not obviously consider whether a Director Finance who is fully involved in the working of the company can also be made liable notwithstanding the absence of such specific averment. It would be idle to assume that proposition (c) is limited in its operation to the Managing Directors and Joint Managing Directors. All office bearers who by the nature of the office that they hold can be

assumed to be in charge of and responsible to the company for the conduct of its affairs do come with in the sweep of proposition (c) in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209). A court has to have an idea as to the role of a Director Finance who is fully involved in the working of a company. It cannot certainly be lightly assumed that a Director Finance is a mere Director. Proposition (b) cannot be mechanically applied in his favour. In that view of the matter, even assuming that the specific averments are insufficient to attract culpability under Sec.141 of the N.I. Act with the help of proposition (a) in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209), I am certainly of opinion that proposition (c) must come into play and must save the complaint from meeting a premature death by invocation of the powers under Sec.482 of the Cr.P.C.

15. At the threshold only the elementary satisfaction need be entertained by a criminal court. The nature of satisfaction which a criminal court should entertain varies from stage to stage. At the threshold it is sufficient if the court is satisfied that

there is sufficient ground to proceed against the accused. At the final stage when the court undertakes the exercise of weighing the evidence in golden scales, stricter standards would, of course, apply. In any view of the matter, I am satisfied that proposition (c) of **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (2005 (4) KLT 209) if not proposition (a) is certainly sufficient to persuade this Court to hold that this is not a fit case where the powers under Sec.482 of the Cr.P.C. can or ought to be invoked.

16. I am not, in these circumstances, adverting to the material which the respondent proposes to rely on in the trial before the court below to show that the petitioner herein had conducted himself in such a manner as to confirm that he in his capacity as Director Finance was in charge of and responsible to the company for the conduct of its affairs.

17. These Crl.M.Cs. are, in these circumstances, dismissed. I may hasten to observe that I have only held that the powers under Sec.482 of the Cr.P.C. cannot and need not be invoked to bring the prosecution to a premature termination. This will not

in any way disentitle the petitioner to raise all necessary and appropriate contentions before the learned Magistrate including the contention that he is not liable under Sec.141 of the N.I. Act for the offence under Sec.138 of the N.I. Act.

18. The learned counsel for the petitioner submits that the offence alleged is only under Sec.138 of the N.I. Act. The petitioner has already entered appearance and has been enlarged on bail by the learned Magistrate. The learned Magistrate may be directed to exempt the petitioner from personal appearance before the learned Magistrate, submits the learned counsel. It is for the petitioner to apply before the learned Magistrate and in a case like the instant one I can find no decipherable reason by which the petitioner's prayer for such exemption should not be considered by the learned Magistrate favourably. Suffice it to say that the learned Magistrate must pass appropriate orders on merits expeditiously on such application.

(R. BASANT, JUDGE)

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